Supreme Court, U.S.
FILED

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No._____

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

JERRY JEFFERSON,

Petitioner

V.

BERTSCH A/K/A BERTSCH & COMPANY, AND PARK CORPORATION

Respondents

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the United States Court of Appeals for the Seventh Circuit err in refusing to give the Mississippi state court judgment full faith and credit?

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PETITION FOR WRIT OF CERTIORARI

Jerry Jefferson respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The order and judgment of the United States Court of Appeals for the Seventh Circuit, App. 1a-5a, and 26a, are not officially reported. The entries and judgment of the United States District Court for the Southern District of Indiana, Indianapolis Division, App. 6a-12a, 13a-25a, and 27a-28a are not officially reported. The judgment

of the Circuit Court for the First Judicial District of Hinds County, Mississippi, App. 29a-31a, is not reported.

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on August 29, 1997. App. 26a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The statutory provision involved is 28 U.S.C. § 1738. The relevant portion of this statute states as follows: ". . . Such Acts, records, and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken."

STATEMENT OF THE CASE

A. Factual Background

On or about April 16, 1993, while operating a roller machine in a foreseeable and intended manner, Jerry Jefferson was severely and permanently injured due to machine's defective design and the negligence, misrepresentations, conduct, and breaches of warranty(ies) of Bertsch, a/k/a Bertsch & Company. Jerry Jefferson suffered extensive physical and mental pain, including loss of his right hand, loss of all phallanges on his left hand, permanent disability, and Mr. Jefferson has incurred and will continue to incur medical expenses, life care expenses, rehabilitative expenses, loss of earnings, loss of earnings capacity, and loss of enjoyment of life.

On June 30, 1993, Jerry Jefferson filed suit in the Circuit Court of the First Judicial District of Hinds County, Mississippi. On August 9, 1993, pursuant to Rule 4(c)(5) of the Mississippi Rules of Civil Procedure, Bertsch & Company was properly served with a copy of the summons and complaint herein, by certified mail, return receipt requested, at Post Office Box 191, Cambridge City, IN 47327. This address is also the current, proper address for Bertsch. Bertsch produces the same product as Bertsch & Company, and they are both known by the same name, "Bertsch". Although Bertsch & Company no longer exists, service upon Bertsch was proper under Mississippi

law and sufficient to give them adequate notice. As evidenced by a copy of the envelope, the summons and complaint was "Refused."

Bertsch & Company did not answer, defend, plead, respond, or otherwise enter an appearance in the Mississippi state court action. Subsequently on December 16, 1993, default was entered against Bertsch & Company by the Circuit Clerk of Hinds County, Mississippi, pursuant to Rule 55 of the Mississippi Rules of Civil Procedure. On March 18, 1994, the Mississippi state court judge entered an Order Granting Default Judgment as to liability against Bertsch & Company. On July 19, 1994, a full hearing was held before the Hinds County Circuit Court. The Circuit Court for the First Judicial District of Hinds County, Mississippi, found that said court had personal jurisdiction over Bertsch & Company. The Mississippi trial court further found that Bertsch & Company had sufficient "minimum contacts" with the State of Mississippi. Also, the Mississippi trial court heard testimony as to damages and granted a final judgment from and against Bertsch & Company in the amount of $4,129,286.93, with interest to accrue at 8% from entry of said judgment.

B. Proceedings Below

This action was initially filed by Jerry Jefferson in the Circuit Court of the First Judicial District of Hinds County, Mississippi, in an effort to recover damages arising out of a products liability accident. Suit was originally filed on June 30, 1993, in the Circuit Court of the First Judicial District of Hinds County, Mississippi. On August 9, 1993, pursuant to Rule 4(c)(5) of the Mississippi Rules of Civil Procedure, Bertsch, a/k/a Bertsch & Company was properly served with a copy of the summons and complaint, by certified mail, return receipt requested. Due to their failure to answer and after an extensive hearing, a final judgment in the amount of $4,129,286.93 was entered by the Mississippi state court judge against Bertsch a/k/a, Bertsch & Company on August 15, 1994.

An action was filed in the United States District Court, Southern District of Indiana, Indianapolis Division, to enforce the Mississippi state court judgment, with jurisdiction based upon diversity of citizenship under 28 U.S.C. § 1332. Bertsch, a/k/a Bertsch & Company, and Park Corporation did not enter an appearance in the Circuit Court of the First Judicial District of Hinds County, Mississippi, to set aside the Mississippi state court judgment, but instead filed a motion for summary judgment in the United States District Court, Southern District of Indiana, Indianapolis Division. In

the district court's Second Entry on Motion of Park Corporation and Bertsch, Its Unincorporated Division, for Summary Judgment, it is clear that the district court improperly went behind the Mississippi state court's findings and judgment, as the district court held that the state court lacked personal jurisdiction. The United States District Court rendered its Judgment granting Bertsch's motion for summary judgment on October 7, 1996.

Alleging that the United States District Court erred in failing to give the Mississippi state court judgment full faith and credit, Jerry Jefferson timely filed a Notice of Appeal to the United States Court of Appeals for the Seventh Circuit. Jurisdiction was based upon 28 U.S.C. § 1291. The Seventh Circuit on August 29, 1997, affirmed the decision of the United States District Court for the Southern District of Indiana, Indianapolis Division.

REASON FOR GRANTING THE PETITION

A. THE SEVENTH CIRCUIT IS IN CONFLICT WITH RELEVANT DECISIONS OF THIS COURT.

This case presents an important issue concerning the enforcement of a foreign judgment. The result of the Seventh Circuit's ruling in this case is in direct conflict with this Court's decision in *Matsushita Elec. Industrial Co., Ltd. v. Epstein,* 116 S.Ct. 873, 877 (1996). In the case at hand, this Court must reverse the Seventh Circuit's holding that the Mississippi state court judgment was not entitled to full faith and credit against Bertsch and Park Corporation. Bertsch, a/k/a Bertsch & Company, and Park Corporation were successful in getting the United States District Court to effectively set aside a Mississippi judgment in clear violation of the Full Faith and Credit Act and to disregard one of the this Court's most recent opinions regarding the enforcement of state court judgments by federal courts.

1. The Mississippi Judgment Must Be Given Full Faith and Credit.

The Seventh Circuit erred in refusing to give full faith and credit to the Mississippi judgment. According to the mandate of this Court:

> The Full Faith and Credit Act mandates that the 'judicial proceedings' of any State 'shall have the

> same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State . . . from which they are taken.' 28 U.S.C. § 1738. The Act thus directs all courts to treat a state court judgment with the same respect that it would receive in the courts of the rendering state. *Federal courts may not 'employ their own rules . . . in determining the effect of state judgments,' but must 'accept the rules chosen by the State from which the judgment is taken.'*

Matsushita Elec. Industrial Co., Ltd. v. Epstein, 116 S.Ct. 873, 877 (1996) *citing Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 481-82 (1982) (emphasis added). Therefore, the district court was required to "employ" the rules of Mississippi.

Rule 55 of the Mississippi Rules of Civil Procedure governs default procedure, and subsection (c) of said rule specifically covers how a default judgment may be set aside.[1] The Comment to Rule 55 specifically states that a default judgment is to be:

> treated as a conclusive and final adjudication of the issues necessary to justify the relief awarded and is given the same effect as a judgment rendered after a trial on the merits. . . Once the default is established, defendant has *no further standing to contest* the factual allegations of plaintiff's claim for relief. If he wishes an opportunity to challenge plaintiff's right to recover, his *only* recourse is to show cause for setting aside the default under Rule 55(c) and, failing that, to contest the amount of recovery. . . . Relief from a default judgment must be requested by a formal application as required by Rule 60(b). Because the request is for relief from a final disposition of the case, the party in default must take affirmative action to bring the case before *the trial court* a second time.

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[1]Miss. R. Civ. Proc. 55(c) states as follows: "For good cause shown, the court may set aside an entry of default and, if a judgment has been entered, may likewise set it aside in accordance with Rule 60(b)."

Official Comment to Miss. R. Civ. Proc. 55 (emphasis added). Bertsch, a/k/a Bertsch & Company, and Park Corporation clearly did not have standing to contest factual allegations as they were allowed to do in the federal courts.

Furthermore, the Mississippi Rules provide possible relief for Bertsch, a/k/a Bertsch & Company, and Park Corporation; however, Bertsch, a/k/a Bertsch & Company, and Park Corporation chose not to pursue any such relief.[2] Bertsch, a/k/a Bertsch & Company, and Park Corporation's only recourse was under Miss. R. Civ. Proc. 60(b), not a motion to dismiss or a motion for summary judgment.[3]

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[2]Jerry Jefferson notified Defendants of the Mississippi default judgment prior to instigating the action in the district court, but Defendants did not take any action in the Mississippi trial court. Plaintiff respectfully submits that Defendants chose not to proceed in Mississippi because it is unlikely they would be successful in making a Rule 60(b) motion to set aside the default judgment under Mississippi law. The Mississippi Supreme Court has held that "[w]e do not think that Rule 60(b) was intended to permit a person, such as appellant, to ignore a summons served upon him . . . ." *Donaldson v. Pontotoc County Welfare Dep't.*, 445 So. 2d 1377, 1379 (Miss. 1984)

[3] Miss. R. Civ. P. 60(b) states as follows:

> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:
> (1) fraud, misrepresentation, or other misconduct of an adverse party;
> (2) accident or mistake;
> (3) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);
> (4) the judgment is void;
> (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application;
> (6) any other reason justifying relief from the judgment.
> The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than six months after the judgment, order, or proceeding was entered or taken. A motion under this subdivision does not affect the finality of a judgment or suspend its operation. Leave to make the motion need not be obtained from the appellate court unless the record has been transmitted to the appellate court and the action remains pending therein. This rule doe not limited the power

Most importantly, Bertsch, a/k/a Bertsch & Company, and Park Corporation selected the wrong court for relief; the Mississippi Rules mandate that the Mississippi trial court is the only court which can afford Bertsch, a/k/a Bertsch & Company, and Park Corporation any relief. The Mississippi Supreme Court has stated "the decision to grant or set aside a default judgment is 'addressed to the sound discretion of the *trial court*.'" *Williams v. Kilgore*, 618 So. 2d 51, 55 (Miss. 1992) (emphasis added) *citing Pointer v. Huffman*, 509 So. 2d 870, 875 (Miss. 1987). The *Williams* court continued stating "[t]his discretion must be exercised in accordance with the rules set forth in Miss. R. Civ. Proc. 55(c) and 60(b)." *Williams*, 618 So. 2d at 55 *citing Guaranty National Insurance Co. v. Pittman*, 501 So. 2d 377, 388 (Miss. 1987). Mississippi case law is clear, and the Mississippi Supreme Court has consistently held that it is the trial court that must rule on Rule 60(b) motions. In fact, the Mississippi Supreme Court "has articulated a three-pronged balancing test which *the trial court should use in determining whether to grant relief* from judgment under Miss. R. Civ. Proc. 60(b)." *Chassaniol v. Bank of Kilmichael*, 626 So. 2d 127, 134 (Miss. 1993) (addressing the setting aside of a default judgment by the *trial court*) (emphasis added). The Mississippi Supreme Court has given the discretion of whether to vacate a default judgment to the trial court. *Chassaniol*, 626 So. 2d at 135 *citing Bailey v. Georgia Cotton Goods Co.*, 543 So. 2d 180 (Miss. 1989); *Bryant, Inc. v. Walter*, 493 So. 2d 933, 936-37 (Miss. 1986). *See also, e.g., Overbey v. Murray*, 569 So. 2d 303, 306 (Miss. 1990) (stating trial court has discretion to grant or deny motion to set aside default judgment). The Mississippi Supreme Court has stated the following:

> Acknowledging the broad equitable powers Rule 60(b) *vests in our trial courts*, this Court has adopted

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> of court to entertain an independent action to relieve a party from a judgment, order or proceedings, or to set aside a judgment for fraud upon the court. Writs of coram nobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished. The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action and not otherwise.

[4]*See also* Official Comment to Miss. R. Civ. Proc. 60 which states "[m]otions for relief under MRCP 60(b) are filed in the **original action**." (emphasis added).

> a balancing test approach respecting relief from a judgment which has been entered by default. Specifically, the Circuit Court [trial court] is directed to consider (1) the nature and legitimacy of defendant's reasons for his default, i.e., whether the defendant has good cause for default, (2) whether defendant in fact has a colorful defense to the merits of the claim, and (3) the nature and extent of prejudice which may be suffered by the plaintiff if the default is set aside.

Burkett v. Burkett, 537 So. 2d 443, 445 (Miss. 1989) *citing H & W Transfer & Cartage Service v. Griffin*, 511 So. 2d 895, 898-99 (Miss. 1987) (emphasis added). *See also King v. King*, 556 So. 2d 716, 719 (Miss. 1990) (instructing trial court to use three-pronged balancing test). Bertsch, a/k/a Bertsch & Company, and Park Corporation improperly argued to the federal courts the following: (1) the reason for their default and (2) their defense to the merits of this case. Bertsch, a/k/a Bertsch & Company, and Park Corporation were successful in getting the federal courts to conduct the balancing test which, according to the Mississippi Supreme Court, can only be done by the Mississippi trial court, where the power is vested. If Bertsch, a/k/a Bertsch & Company, and Park Corporation wished to argue these factors, Mississippi law dictates that they must do so to the Mississippi trial court.

2. The Judgment is Against Bertsch.

The Mississippi Judgment is against Bertsch, not the dissolved Bertsch & Company. The Seventh Circuit found that although the judgment was entitled to full faith and credit against Bertsch & Company, it was not entitled to full faith and credit against Bertsch and Park Corporation.

The Mississippi Supreme Court has held that where a defendant fails to appear to object to a misnomer, such objection is waived, and the default judgment valid. *Campbell & Campbell v. Pickens Bank*, 99 So. 378 (Miss. 1924). In *Campbell*, a judgment was entered against the Bank of Pickens, which was intended to be against the Pickens Bank. *Campbell*, 99 So. at 379. At the time of service, the Pickens Bank was the only bank operating in Pickens, and similar to the present case, the Pickens Bank had been liquidated. *Id.* The Mississippi Supreme Court held that the Pickens Bank "was or ought to have been informed" by the service of the summons even though it had the name of a defunct corporation, and the court

concluded that the Pickens Bank "having failed to avail of the opportunity to appear and object to the misnomer, it is now precluded from objecting, and is bound by the judgment, though not against it by its true name." *Id.* at 380. This case is directly on point to the present case and cannot be successfully distinguished by the Bertsch, a/k/a Bertsch & Company, and Park Corporation. Like the Pickens Bank, Bertsch, a/k/a Bertsch & Company, and Park Corporation did not appear to object to the misnomer, and now, they are precluded from objecting and are bound by the Mississippi judgment which should be enforced. The proper procedure for Bertsch, a/k/a Bertsch & Company, and Park Corporation to have taken was to appear, answer, and raise any issues as defenses in the Mississippi trial court. The Mississippi Rules of Civil Procedure provide a procedure that the Bertsch, a/k/a Bertsch & Company, and Park Corporation could have taken, as Miss. R. Civ. P. 12(b) allows specifically for the defenses of an alleged improper party, such as lack of jurisdiction, insufficient service of process, and/or failure to state a claim upon which relief can be granted. As stated by the Supreme Court of the United States, Bertsch, a/k/a Bertsch & Company, and Park Corporation's failure "to avail [themselves] of the full procedures provided by state law does not constitute a sign of their inadequacy." *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 485 (1982).

3. The Mississippi Judgment is Valid and Must Be Enforced Against Bertsch.

The federal courts had a "limited scope of review" in determining whether the judgment should be enforced. *Underwriters Nat'l Assurance Co. v. North Carolina Life and Accident and Health Ins. Guar. Assoc.*, 455 U.S. 691, 706 (1982). The only proper issue before the federal courts was whether the Mississippi judgment should be enforced. This only required the federal courts to examine whether the service was proper and whether due process was offended. The United States Supreme Court has held that:

> State proceedings need do no more than satisfy the minimum procedural requirements of the Fourteenth Amendment's Due Process Clause in order to qualify for the full faith and credit guaranteed by federal law. It has long been established that §1738 does not allow federal courts to employ their own rules of res judicata in determining the effect of state judgments. Rather, it goes beyond the common law and commands a federal court to accept the rules chosen by the State from which the judgment is taken.

> [citations omitted.] As we recently noted in *Allen v. McCurry*, [] 'though the federal courts may look to the common law or to the policies supporting res judicata and collateral estoppel in assessing the preclusive effect of decisions of other federal courts, Congress has specifically required all federal courts to give preclusive effect to state-court judgments whenever the courts of the State from which the judgment emerged would do so.'

Kremer v. Chemical Construction Corp., 456 U.S. 461, 481-82 (1982) (citation omitted).

Under the Mississippi Long Arm statute, the Mississippi trial court had jurisdiction over those defendants who "commit[ed] a tort in whole or in part in this state against a resident." Miss. Code Ann. § 13-3-57 (Supp. 1996). In interpreting the statute, the Fifth Circuit Court of Appeals has stated:

> Both by its language and by interpretation the statute includes in its reach defendants who commit a single tort. An alleged tortfeasor need not have been present in the state. If, as is alleged in this case, he causes injury in Mississippi, he is covered by the statute. *Smith v. Temco, Inc.*, 252 So. 2d 212, 216 (Miss. 1971).

Brown v. Flowers Industries, Inc., 688 F.2d 328, 333 (5th Cir. 1982) (footnotes omitted). With regard to due process, a two part test is conducted: "(1) the nonresident must have certain minimum contacts with the forum state; and (2) subjecting the nonresident to jurisdiction within the forum must be consistent with traditional notions of fair play and substantial justice." *Thompson v. Chrysler Motors Corp.*, 755 F.2d 1162, 1168 (5th Cir. 1985) (citations omitted).

These issues were litigated in the Mississippi trial court, and the Mississippi state court judge found, and the Final Judgment reflects, that "[t]his Court has personal jurisdiction over Defendant Bertsch & Company pursuant to Miss. Code Ann. § 13-3-57, as the Court finds that Bertsch & Company committed a tort in whole or in part within the State of Mississippi. This Court further finds that Defendant Bertsch & Company had sufficient 'minimum contacts' with the State of Mississippi such that the exercise of personal jurisdiction over Bertsch & Company is proper and constitutional."

According to the pronouncements of this Court, these issues are precluded from relitigating as "[t]he principles of res judicata apply to questions of jurisdiction as well as to other issues." *Underwriters Nat'l Assurance Co. v. North Carolina Life and Accident and Health Ins. Guar. Assoc.*, 455 U.S. 691, 706 (1982) (citations omitted). Specifically, "a judgment is entitled to full faith and credit -- even as to questions of jurisdiction -- when the second court's inquiry discloses that those questions have been fully and fairly litigated and finally decided in the court which rendered the judgment." *Underwriters Nat'l Assurance Co.*, 455 U.S. at 706 (footnote omitted). The only evidence presented to regarding due process and jurisdiction was the valid Mississippi Judgment and its findings based upon a valid hearing. Bertsch, a/k/a Bertsch & Company, and Park Corporation did not present any credible evidence to the federal courts regarding minimum contacts. However, the district court and the Seventh Circuit improperly concluded that personal jurisdiction over Bertsch and Park Corporation was lacking without any evidence in the record to support such a finding.

As the Seventh Circuit has previously stated, the statutory command of 28 U.S.C. § 1738 is met through applying res judicata and collateral estoppel. *Koen & Assocs. v. City of Cairo,* 909 F.2d 992, 997 (7th Cir. 1990). While inquiring into the jurisdictional basis of a state court judgment, the district court must extend full faith and credit when the inquiry reveals that the issue of jurisdiction was litigated in the state court. Here, the Mississippi state court held that it had jurisdiction; therefore, the federal courts were estopped from relitigating the issue pursuant to the doctrine of res judicata. The Full Faith and Credit statute, 28 U.S.C. § 1738, dictates that the extent to which a state court judgment collaterally estops litigation of issues subsequently raised in federal litigation is determined by state law. *Charles Koen & Associates v. City of Cairo,* 909 F.2d 992, 997 (7th Cir. 1990).

The doctrine of res judicata or its subsidiary doctrine of collateral estoppel precludes the relitigation of issues. Under Mississippi law, res judicata precludes "all claims that were or reasonably may have been brought in the original action." *Bowe v. Bowe,* 557 So. 2d 793, 794 (Miss. 1990). The Mississippi Supreme Court has enumerated the following four identities which must be present for res judicata to be applied: "(1) identity of the subject matter of the action, (2) identity of the cause of action, (3) identity of the parties to the cause of action, and (4) identity of the quality or character of a person again whom the claim is made." *Dunaway v. Hopper,* 422 So. 2d 749, 751 (Miss. 1982) (citations omitted). If

these four identities are present, all issues previously tried, as well as all matter which "should have been litigated and decided in the prior suit", cannot be litigated in the subsequent suit. *Dunaway*, 422 So. 2d at 751. Any defense which could have been raised, regardless of if the defense was asserted, is barred from being litigated in a second suit. *Id.* (quoting *Key v. Wise*, 629 F.2d 1049, 1063 (5th Cir. 1980), *reh. denied*, 645 F.2d 72 (5th Cir. 1981), *cert. denied*, 454 U.S. 1103 (1981) (quoting *Brown v. Felsen*, 442 U.S. 127 (1979)). According to the Mississippi Supreme Court, when collateral estoppel is applicable, "the parties will be precluded from relitigating a specific issue [1] actually litigated, [2] determined by, and [3] essential to the judgment in a former action, even though a different cause of action is the subject of the subsequent action." *Hollis v. Hollis*, 650 So. 2d 1371, 1377 (Miss. 1995) (citations omitted). To determine that jurisdiction was already litigated and determined, a review of the Final Judgment entered by the Mississippi state court judge is all that is necessary. In spite of the Seventh Circuit's ruling in this case, they have previously conceded that "the Supreme Court made clear that, under 28 U.S.C. § 1738, federal courts are obliged to apply both the claim and issue preclusion rules of the state that rendered the prior judgment." *Charles Koen & Assocs*, 909 F.2d at 997 (citation omitted).

Rule 4(c) of the Mississippi Rules of Civil Procedure addresses service of summons, and specifically Rule 4(c)(5) allows for "Service by Certified Mail on Person Outside State." In this action, Jerry Jefferson chose to serve Bertsch, a/k/a Bertsch & Company, pursuant to Rule 4(c)(5) by mailing Bertsch, a/k/a Bertsch & Company, a copy of the complaint and a summons by certified mail, return receipt requested. Although Bertsch, a/k/a Bertsch & Company, "refused" said mail, they were properly served, as Rule 4(c)(5) states "[s]ervice by this method shall be deemed complete as of the date of delivery as evidenced . . . by the returned envelop marked "Refused." Miss. R. Civ. Proc. 4(c)(5). The Mississippi Supreme Court has previously addressed this method of service and encouraged its use by stating "had the plaintiff followed the procedure of Rule 4(c)(5) and secured service of process by certified mail, return receipt requested, restricted delivery, personal jurisdiction over the defendant to render a personal judgment would have been accomplished." *Noble v. Noble*, 502 So. 2d 317, 320 (Miss. 1987). Jerry Jefferson did precisely what the Mississippi Supreme Court advised, and as such, service was proper and personal jurisdiction was obtained.

Although Bertsch, a/k/a Bertsch & Company, and Park Corporation argue that they did not receive adequate notice as the

summons was sent to "Bertsch & Company" instead of "Bertsch," this argument is not credible under Mississippi case law.[5] In *Rich v. Nevels*, 578 So. 2d 609 (Miss. 1991), the sheriff served the defendant, Wilma Rich, with a summons in which the defendant's name was spelled "Wilma Ritchie." *Rich*, 578 So. 2d at 610. The trial court granted a default judgment after the defendant did not file a response. *Id.* When the judgment was challenged based upon the misnomer in the summons, the Mississippi supreme court set forth the following test to determine the enforceability of a judgment - "whether or not a person would have known they were being sued even though the name did not properly appear on the summons." *Rich*, 578 So. 2d at 612. When the Mississippi supreme court utilized this test, they concluded that the summons stating "Ritchie" instead of "Rich" was "sufficient to notify a reasonable person that they were being sued." *Id.* Therefore, a misnomer is only fatal in situations when the summons is so defective that the party is mislead. Bertsch, a/k/a Bertsch & Company, and Park Corporation were not mislead. They simply ignored the summons served upon them and now have a default judgment against them.

Under the proof presented and outlined above, the Mississippi judgment is valid, and under Mississippi law, the judgment is against Bertsch. Accordingly, the judgment must be given full faith and credit. For the foregoing reasons, this Court should find that the Seventh Circuit erred, reverse the entry of judgment, and order that the state court judgment be enforced.

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[5] *See supra* discussion of *Campbell & Campbell v. Pickens Bank*, 99 So. 378 (Miss. 1924).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: November 26, 1997

APPENDIX

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

Argued April 24, 1997
Decided August 29, 1997

Before
Hon. Frank H. Easterbrook, Circuit Judge
Hon. Michael S. Kanne, Circuit Judge
Hon. Terrence T. Evans, Circuit Judge

JERRY JEFFERSON,
Plaintiff-Appellant,

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division

No. 96-3676 v. No. 95 C 177

BERTSCH, also known as
Bertsch & Co., and Park Corp.,
Defendants-Appellees.

John D. Tinder,
Judge.

ORDER

I. HISTORY

Jerry Jefferson filed a product liability action against an entity called "Bertsch & Company," which the complaint identified as an Indiana corporation. The case was filed in the Circuit Court of Hinds County, Mississippi. Jefferson's complaint in the Mississippi action named Bertsch & Company, as well as several other corporations, as defendants. Although the complaint itself asserted no jurisdictional basis with regard to Bertsch & Company, the Mississippi state trial court based its jurisdiction on the tort-prong of the Mississippi long-arm statute.

Bertsch & Company had been an Indiana corporation with its principal place of business in Indiana. In 1986, however, Bertsch & Company was liquidated in bankruptcy proceedings in the United States Bankruptcy Court for the Southern District of Indiana. Bertsch & Company was then administratively dissolved by the Indiana Secretary of State in 1987.

The Bankruptcy Court's order directed the sale of Bertsch & Company to proceed pursuant to an "Asset Purchase Agreement," in which Park Corporation and its unincorporated subsidiary Bertsch ("Park/Bertsch") would purchase Bertsch & Company. According to that agreement: 1) Park/Bertsch purchased the assets of Bertsch & Company for cash; 2) Park/Bertsch expressly contracted not to assume any liabilities or obligations of Bertsch & Company; 3) the terms of the sale were approved by the Bankruptcy and District Courts; 4) Park/Bertsch did not cause the dissolution of Bertsch & Company; 5) no officer, director or shareholder of Bertsch & Company was ever an officer, director or shareholder of Park/Bertsch or any other of Park's divisions.

As there was no response to the complaint by the defunct Bertsch & Company, on March 18, 1994, the Mississippi court entered a default judgment against it for $4,129,286.93. Jefferson then attempted to enforce the Mississippi court's judgment against Park/Bertsch in federal district court in the Southern District of Indiana, arguing that Park/Bertsch was in effect the same company as Bertsch & Company and that therefore the judgment should be accorded full faith and credit against Park/Bertsch. Park/Bertsch moved for summary judgment, arguing that they were a wholly distinct entity from Bertsch & Company and that therefore the federal court in Indiana lacked jurisdiction to accord the Mississippi judgment full faith and credit. The district court granted the summary judgment motion, holding that the default judgment was not entitled to full faith and credit because the Mississippi court had no personal jurisdiction over Park/Bertsch, and there existed no successor liability between Park/Bertsch and Bertsch & Company.

II. ANALYSIS

A. Full Faith and Credit

The Full Faith and Credit Act, 28 U.S.C. § 1738, "requires federal courts to give the same preclusive effect to state court judgments that those judgments would be given in the courts of the State from which the judgments emerged." *Marx v. M & I of*

Watertown, 17 F.3d 1012, 1014 (7th Cir. 1994) (quoting *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 466 (1982)). On the other hand, it is well settled that a judgment imposing a personal obligation or duty in favor of a plaintiff may be entered only by a court having jurisdiction over the defendant. *World-Wide Volkswagen Corp. v. Woodson,* 444 U.S. 286, 291(1980). Moreover, a judgment entered in absence of personal jurisdiction in the first forum is not subject to full faith and credit in the second forum. *Hansburry v. Lee,* 311 U.S. 32, 40 (1940); *Hazen Research, Inc. v. Omega Minerals, Inc.*, 497 F.2d 151(5th Cir. 1974); *see Sanders v. Humphrey,* 735 F. Supp. 209 (S.D. Miss. 1990) (holding that a Mississippi state court was not required to give full faith and credit to a Louisiana judgment where the rendering court did not have personal jurisdiction over the Mississippi resident); *Peters v. Peters,* 560 So. 2d 722, 723 (Miss. 1990) (holding that "if the court is without jurisdiction--subject matter or personal--no one is bound by anything the court may say regarding the (de)merits of the case"). Accordingly, the Mississippi judgment is not entitled to full faith and credit as against Park/Bertsch if the Mississippi trial court lacked personal jurisdiction over Park/Bertsch.

B. Personal Jurisdiction

Mississippi law regarding personal jurisdiction is summarized as follows: "Before a court, any court, has authority to make an adjudication affecting the important rights of a nonresident... at least four predicates must be established:" 1) the defendant must be amenable to suit in Mississippi under the state's long arm statute;[1] 2) the defendant must have sufficient "minimum contacts" with the forum such that he is constitutionally amenable to suit in the forum; 3) the defendant must have been afforded notice and a meaningful

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[1] Mississippi's long-arm statute provides, in relevant part:

> Any nonresident person, firm... or any foreign or other corporation not qualified under the Constitution and laws of this state as doing business herein, who shall make a contract with a resident of this state to be performed in whole or in part by any party in this state, or who shall commit a tort in whole or in part in this state against a resident or nonresident of this state, or who shall do any business or perform any character of work or service in this state, shall by such act or acts be deemed to be doing business in Mississippi and shall thereby be subjected to the jurisdiction of the courts of this state.

Miss. Code Ann. § 13-3-57.

opportunity to be heard; and 4) the defendant must have been properly served with process. *Nobel v. Nobel,* 502 So. 2d 317, 321 n. 1 (Robertson, J., concurring in part and dissenting in part). Each of these requirements must be satisfied before a court's adjudication of a defendant's rights is entitled to full faith and credit. *Id.* In the case before us, Jefferson cannot satisfy even the first of the four requirements.

Jefferson is unable to demonstrate that Park/Bertsch was subject to suit under the Mississippi long-arm statute. In the Mississippi action, the finding of personal jurisdiction over Bertsch & Company was expressly based on the tort-prong of the Mississippi long-arm statute. Although under Mississippi law a single act under the tort-prong is enough to confer personal jurisdiction, the tort complained of in the underlying transaction did not arise from any acts committed by Park/Bertsch. In the underlying transaction, the Mississippi court found only that it had "personal jurisdiction over Defendant Bertsch & Company" because Bertsch & Company had committed a tort in Mississippi and "Bertsch & Company had sufficient 'minimum contacts' with the State of Mississippi only such that the exercise of personal jurisdiction over Bertsch & Company was proper and constitutional."

Quite clearly, the Mississippi court made no findings regarding its personal jurisdiction over Park/Bertsch. Moreover, Jefferson plainly represented to the Mississippi court that the judgment was sought against the "dissolved" "Bertsch & Company," as opposed to asking for a judgment against Park/Bertsch. While the Mississippi court may have rightfully found that Bertsch & Company committed the tort in Mississippi, it is uncontroverted that Park/Bertsch did not manufacture, sell, upgrade, repair, or service the offending product in Mississippi. In other words, Park/Bertsch did not commit any act in Mississippi relevant to the underlying tort.

Thus, it appears that Park/Bertsch is not subject to Mississippi's long-arm jurisdiction, but, if the "Asset Purchase Agreement" between Park/Bertsch and Bertsch & Company placed corporate successor liability upon Park/Bertsch -- a different case is presented. However a corporation that purchases the assets (but not the stock) of another corporation is not burdened with the liabilities of the corporation from which the assets are purchased. *EEOC v. G-K-G, Inc.,* 39 F.3d 740, 747 (7th Cir. 1994); *Clark Equipment Co. v. Dial Corp.,* 25 F.3d 1384, 1387 (7th Cir. 1994); *Russell v. SunAmerica,* 962 F.2d 1169, 1175 (5th Cir. 1992). Only if a sale is "merely a step in a corporate reorganization designed to shift liabilities

to an empty shell" will the a party be allowed to proceed against an asset-purchaser. *G-K-G, Inc., 39* F.3d at 740 (citing *Chaveriat v. Williams Pipe Line Co.,* 11 F.3d 1420, 1424-26 (7th Cir. 1993)).

In this case, Jefferson did not address the issues of successor liability in his summary judgment filings. Moreover, our review of the record reveals that in the court-approved "Asset Purchase Agreement," Park/Bertsch expressly agreed to purchase only the assets and not the liabilities from Bertsch & Company. Furthermore, we find no continuity of officers, directors, or shareholders between Park/Bertsch and Bertsch & Company. Consequently, there is no genuine issues of material fact with respect to whether Park/Bertsch is a successor corporation of Bertsch & Company. We therefore find that Park/Bertsch and Bertsch & Company are two distinct companies and that the Mississippi trial court's finding of personal jurisdiction over Bertsch & Company did not render personal jurisdiction over Park/Bertsch .

Having found no basis under the Mississippi long-arm statute for exercise of jurisdiction over Park/Bertsch , we need not consider the due process or service of process issues. Accordingly, the judgment of the Circuit Court of Hinds County, Mississippi was against Bertsch & Company, not Park/Bertsch , and that the judgment is, therefore, entitled to full faith and credit against only Bertsch & Company.

AFFIRMED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

JERRY JEFFERSON,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	IP *95-0177-C-T/G*
	)	
BERTSCH a/k/a BERTSCH & COMPANY and PARK CORPORATION,	)	
	)	
Defendants.	)	

SECOND ENTRY ON MOTION OF PARK CORPORATION AND BERTSCH, ITS UNINCORPORATED DIVISION, FOR SUMMARY JUDGMENT

This matter comes before the court on the motion of Defendants Park Corporation ("Park"), and Bertsch, its unincorporated division, (collectively "Park/Bertsch"), for summary judgment, pursuant to Fed R. Civ. P.56. Diversity jurisdiction is properly founded on 28 U.S.C. § 1332(a). The court noted in its September 18, 1996, Entry that summary judgment would probably be granted in favor of Defendants. The court also granted Plaintiff's motion for Oral Argument so counsel could explain whether the court's view of the matter was correct. The argument was held on October 3,1996, with counsel opting to participate by telephone. The court, having considered the briefs and the arguments of the parties in this matter, finds its reasoning in the prior Entry to be unaltered by the oral arguments. Accordingly, for the reasons stated in the September 18, 1996, Entry, as amplified by those set forth below, the Defendant's motion for summary judgment will be granted.

I. BACKGROUND FACTS AND PROCEDURAL HISTORY

For an explanation of the background facts and procedural history of the instant cases, see this court's September 18, 1996, Entry on Motion of Park Corporation Bertsch, its Unincorporated

Division, For Summary Judgment and Notice of Oral Argument (hereinafter "First Entry" at 2-5.)

II. DISCUSSION

The First Entry found that (1) Park/Bertsch purchased the assets of Bertsch & Company for cash; (2) Park/Bertsch expressly contracted not to assume any liabilities or obligations of Bertsch & Company; (3) The terms of the sale were approved by the Bankruptcy and District Courts; (4) Park/Bertsch did not cause the dissolution of Bertsch & Company; (5) There was no commonality of officers, managers, director, or shareholders; (6) The facts in (1) through (5) led the court to further conclude there was no privity under Mississippi law between Park/Bertsch and Bertsch & Company, and therefore Park/Bertsch was not liable for Bertsch & Company's torts; (7) Park/Bertsch did not manufacture; sell, service or repair the offending product; and therefore committed no tort in Mississippi with respect to the offending product; (8) Because Park/Bertsch committed no tort in Mississippi, and because the acts of Bertsch & Company cannot be imputed on Park/Bertsch, the Mississippi court in the underlying action did not have personal jurisdiction over Park/Bertsch; (9) The judgment in the underlying action was against Bertsch & Company; (10) Lacking personal jurisdiction in the underlying action, and there being no privity between Park/Bertsch and Bertsch & Company, the underlying judgment is not entitled to full faith and credit. The oral argument did not change the court's analysis. Some amplification, however, follows.

A. Personal Jurisdiction

It is well-settled that a "valid judgment imposing a personal obligation or duty in favor of the Plaintiff may be entered only by a court having jurisdiction over the person of the Defendant." *Noble v. Noble*, 502 So. 2d 317, 320 (Miss. 1987). Further, a judgment entered in absence of in personam jurisdiction in the first forum is not subject to full faith and credit in the second forum. *Hansbeny v. Lee*, 311 U.S. 32, 40 (1940); *Hazen Research, Inc. v. Omega Minerals, Inc.*, 497 F.2d 151 (5th Cir. 1974); *Sanders v. Humphrey*, 735 F. Supp. 209 (S.D. Miss. 1990). Indeed, "if the court is without jurisdiction-subject matter or personal-no one is bound by anything the court may say regarding the (de)merits of the case." *Petters v. Petters*, 560 So. 2d 722, 723 (Miss. 1990).

Yet, despite being urged on several occasions to establish the existence of personal jurisdiction in the underlying action, the Plaintiff

has steadfastly maintained that because Park/Bertsch refused service, they are bound by the underlying judgment under a "misnomer" theory.

This argument misses the point. In *Noble,* the Mississippi Supreme Court noted that before any court "has authority to make an adjudication of important rights of a nonresident... at least four predicates must be established;" 502 So. 2d at 320 n.1 (Robertson, J., concurring in part, dissenting in part): (1) the Defendant must be amenable to suit in Mississippi under the Mississippi long-arm statute; (2) the Defendant must have sufficient minimum contacts "with the forum such that he is constitutionally amenable to suit in the forum; (3) the Defendant must have been afforded with notice and a meaningful opportunity to be heard; and (4) the Defendant must have been property served with process. *Id.* Each of these are independent requirements which must be met before a court's adjudication of a Defendant's rights is entitled to full faith and credit. *Id. (See* First Entry at 8-9.) Far from all of these requirements being satisfied, at most, only one is.

The first two requirements were not satisfied in the underlying action. The Mississippi judge's finding of in personam jurisdiction over Bertsch & Company was expressly based on the tort-prong of the Mississippi long-arm statute. Assuming, arguendo, that "Bertsch & Company" meant "Park/Bertsch," this finding is clearly erroneous unless it is based on some type of successor liability.[1] This is because, absent an assumption of the predecessor's liabilities, the contacts of the predecessor corporation will not be imputed to the successor in order to establish personal jurisdiction. *Singletary v. B.*

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[1]Plaintiff did not address the issues of privity or successor liability in its summary judgment filings; consequently he failed to demonstrate the existence of a genuine issue of material fact with respect to these issues and the court would therefore be justified in accepting the facts offered by the movant, and contained in the record, as being established for the purpose of deciding the summary judgment motion. Nonetheless, the Plaintiff had every opportunity to argue the issue of successor liability during the hearing. Indeed, in response to the court's query, the Plaintiff said that he was not arguing "mere continuation" or any other exception to the general rule of nonliability of the successor corporation. Further, irrespective of Plaintiff's concession, the court, noting the common address shared by Bertsch, Park's unincorporated division, and Bertsch & Company, *sua sponte,* raised and analyzed successor liability in the First Entry. The record amply demonstrates, and the First Entry adequately documents, (First Entry at 16-17), that Park/Bertsch is not liable under Mississippi law for Bertsch & Company's liabilities under any theory of successor liability.

R.X., Inc., 828 F.2d 1135, 1135-37 (5th Cir. 1987) (applying Mississippi law). Rather, the court must examine what contacts the Defendant *itself* had with Mississippi. *Johnston v. Pneumo Corp.*, 652 F. Supp. 1402, 1406 (S.D. Miss. 1987).

The First Entry made clear that Park/Bertsch had no contacts with respect to the offending product and that Park/Bertsch expressly declined to assume Bertsch & Company's liabilities. (First Entry at 10-17.) This sale without assumption of liability was acknowledged and approved by both the Bankruptcy and District Courts, "in all respects." (Entry at 3.) Also, it is uncontroverted that Park/Bertsch itself did not commit a single act in Mississippi with respect to the offending product. It did not manufacture, sell, service or repair the product. Consequently, Park/Bertsch was not subject to personal jurisdiction under the tort-prong of the long-arm statute. Yet, Plaintiff argued at the hearing that the Mississippi judge made a separate finding of personal jurisdiction under the "doing business" prong of the long-arm statute. This assertion is patently incorrect. The Plaintiff justified his assertion by quoting the Mississippi judge's "separate" findings concerning personal jurisdiction:

> This Court has personal jurisdiction over Defendant Bertsch & Company pursuant to Miss. Code Ann. § 13-3-57, as the Court finds that Bertsch & Company committed a tort in whole or in part within the State of Mississippi. This Court further finds that Defendant Bertsch & Company had sufficient "minimum contacts" with the State of Mississippi such that the exercise of personal jurisdiction over Bertsch & Company is proper and constitutional.

(Ex. 2, ¶ 11, Aff. Of James D. Morton in Supp. Of Defs.' Mot. For Summ. J.) This so-called "separate" finding of personal jurisdiction is nothing more than a finding that Bertsch & Company had sufficient "minimum contacts" to comport with the due process demanded by the United States Constitution. *Pneumo Carp.*, 652 F. Supp. 1402, 1406-08 (S.D. Miss 1987): *Sorrells* v. *R&R Custom Coach Works, Inc.*, 636 So. 2d 668, 672-75 (Miss. 1994). In other words it is the due process analysis, requirement (2) above, which must follow every finding of personal jurisdiction under *any* prong of a state long-arm statute. In this case, the finding was that personal jurisdiction predicated on the tort prong comported with due process. Contrary to Plaintiff's assertion, this is not a separate finding of personal jurisdiction under the "doing business" prong. *See, e.g., Cycles Ltd. v. W.J. Digby, Inc.*, 889 F.2d 612, 620 (5th Cir. 1989) (applying

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Mississippi law); *Peterson v. Test Int'l, E.C.*, 904 F. Supp. 574, 578-79 (S.D. Miss. 1995).

B. Notice

Despite the court's urgings that Plaintiff must address the personal jurisdiction concerns, he bas unwaveringly asserted that Park/Bertsch received proper notice and should have appeared to contest jurisdiction in Mississippi. Plaintiff further maintains that Park/Bertsch waived its opportunity to be heard and cannot now attack the judgment. Unfortunately, "[a] fundamental precept of the law is that service of process alone does not serve to confer jurisdiction over a person." *Sanders*, 735 F. Supp. at 212. Indeed, as the court noted in its March 22, 1998, Entry on Motion of Park Corporation and Bertsch, its Unincorporated Division to Dismiss, this ignores the fundamental due process concerns. (p.6 n.2.) *See Noble*, 502 So. 2d 320 n.1 (all requirements must be independently met). In fact, "[s]ince Plaintiff [could not] use the Mississippi long-arm statute to obtain [jurisdiction] over the Defendants, the Plaintiff [had] no *method* by which [it could] obtain legally valid service of process on the Defendants. *Black v. Carey Canada, Inc.*, 791 F. Supp. 1120, 1125 (S.D. Miss. 1990) (emphasis added).

Plaintiff cites *Campbell & Campbell v. Pickens Bank*, 99 So. 378 (Miss. 1924), to support his contention that service on Bertsch & Company conferred notice[2] and, therefore, jurisdiction over

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[2] Although, in light of this court's finding of no personal jurisdiction, not relevant to the decision to grant Defendant's Motion for Summary Judgment, the court questions the constitutionality of service of process pursuant to Miss. R. Civ. P. 4(c)(5). The court only finds mere dicta in *Noble v. Noble*, 502 So. 2d 317, 320, which notes that if service of process had been executed pursuant to Rule 4(c)(5), it would have perfected personal jurisdiction. Yet, the court finds no cases in Mississippi, or the Fifth Circuit, where this mode of service was directly attacked and upheld as constitutional. An unopened envelope marked "Refused," hardly seems "reasonably calculated" to afford notice in the absence of x-ray vision. *See Mullane v. Central Hanover Bank & Trust Ca.*, 339 U.S. 306, 314 (1950); *Covington v. Covington, 459* So. 2d 780 (Miss. 1984). For example, if "Wal Mart" had been served with process addressed to "Bertsch & Company," and refused to accept delivery, that would properly afford notice according to Rule 4(c)(5) as written. At odds with Mississippi's method of service, the majority of jurisdictions consulted, as well as the Federal Rules of Civil Procedure, require personal service at Defendant's expense in the event that substituted service by registered mail is refused, or the acknowledgment form is not returned. *See, e.g., Schnabel v. Wells*, 922 F.2d 726, 728(11th Cir. 1991); *Jacobson v. McIlwain*, 145 F.R.D. 595,601 (S.D. Fla. 1992); *DA. V. D.R.L.*, 727 P.2d 768, 769 (Alaska 1986); *Tandy Corp.*

Park/Bertsch. In *Campbell* , the correct party was incorrectly named and served. This is a classic example of a "misnomer." In the instant case, however, the Plaintiff certified to the Mississippi court that it was seeking judgment against "Bertsch & Company" a "dissolved" corporation. Therefore, when Bertsch, an unincorporated division of Park, was served, it was the incorrect party being served with process labeled with the correct party's name. This is not a misnomer. Misnomer or not, however, the key distinction between *Campbell* and the instant case is that Pickens Bank was subject to in personam jurisdiction by virtue of its presence in the forum. Indeed, Plaintiff's counsel in the instant case conceded at the hearing that *Campbell* was a service-of-process case and not a personal-jurisdiction case. The service of process in the case at bar, proper or not, did not cure the lack of personal jurisdiction over Park/Bertsch. In other words, the court's analysis would not change even if Park had been named and served. Specifically, since Park committed no acts in Mississippi in connection with the tort complained of, it would not have been subject to in personam jurisdiction, arid, consequently, any default judgment is not be entitled to full faith and credit. Accordingly, the misnomer argument, even if applicable, is without merit since the facts indicate a lack of personal jurisdiction. *See Petters,* 560 So. 2d at 723; *Noble,* 502 So. 2d at 321 n.1.

III. Conclusion

The court's previous findings in its First Entry of September 18, 1996, remain unchanged. For the reasons stated in the First Entry, along with those stated above, the Defendant's Motion for Summary Judgment will be GRANTED.

ALL OF WHICH IS ORDERED this 7th day of October 1996.

s/ John Daniel Tinder, Judge
United States District Court

Copies to:

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v. Superior Court, 117 Cal. App. 3d 911, 913 (1981). Also, default judgments are not supported unless sufficient return of proof of service appears on the record. *Aetna Business Credit, Inc., v. Universal Decor & Interior Design, Inc.,* 635 F.2d 434, 434-35 (5th Cir. 1981). However, because the court has found personal jurisdiction in the underlying action to be absent under the long-arm statute, it need not further address the issue of proper service of process

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

JERRY JEFFERSON,	)	
	)	
Plaintiff,	)	IP 95-0177-C-T/G
	)	
vs.	)	
	)	
BERTSCH a/k/a BERTSCH & COMPANY AND PARK CORPORATION,	)	
	)	
Defendants.	)	

ENTRY ON MOTION OF PARK CORPORATION AND BERTSCH, ITS UNINCORPORATED DIVISION, FOR SUMMARY JUDGMENT AND NOTICE OF ORAL ARGUMENT

This matter comes before the court on the motion of Defendants Park Corporation ("Park"), and Bertsch, its unincorporated division, (collectively "Park/Bertsch"), for summary judgment pursuant to Fed. R. Civ. P.56(b). Diversity jurisdiction is properly founded on 28 U.S.C. § 1332(a). The court, having considered the briefs and the submissions of the parties, finds that Defendants' Motion for Summary Judgment is likely to be granted for the reasons set forth below. Plaintiff's Motion for Oral Argument is GRANTED so counsel can explain whether the court's view of this matter is correct.

I. BACKGROUND FACTS AND PROCEDURAL HISTORY

On June 30, 1993, the Plaintiff in this action, Jerry Jefferson ("Jefferson") filed a product liability suit against an entity called "Bertsch & Company," an Indiana corporation, in the Circuit Court of the First Judicial District of Hinds County, Mississippi (the "Mississippi action"). (Ex. 1, Aff. of James D. Morton in Supp. of

Defs.' Mot. for Summ. J. [hereafter "Morton Aff."] Jefferson's Complaint in the Mississippi action named, *inter alia,* as Defendants: Bertsch & Company, Westinghouse Electric Corporation ("Westinghouse"), General Electric Company ("GE"), and Furnas Electric Company ("Furnas"). (Ex. 1, Morton Aff.) The Complaint asserted jurisdiction over Westinghouse and GE based on service of process on their respective registered agents in Mississippi. (Ex. 1, ¶¶ 3 & 4, Morton Aff.) It asserted jurisdiction over Furnas based on "doing business" in Mississippi and committing a tort in Mississippi. (Ex. 1, ¶ 5, Morton Aff.) Although the Complaint asserted no basis of jurisdiction over Bertsch & Company, (Ex. 1¶11, Morton Aff.), the Mississippi court based jurisdiction on the tort-prong of the Mississippi long-arm statute. (Ex. 2,¶ I, Morton Aff.) Jefferson received a settlement from Westinghouse, GE and Furnas. (Ex. 2. ¶ 9, Morton Aff.)

Until 1987, Bertsch & Company was an Indiana corporation with its principal place of business in Indiana. (Aff. of Robert J. Peterson in Supp. of Defs.' Mot. for Summ. J. [hereafter "Peterson Aff."].) In 1986 Bertsch & Company was liquidated in bankruptcy proceedings in the United States Bankruptcy Court, Southern District of Indiana. Bertsch & Company was then "administratively dissolved by the Indiana Secretary of State in 1987." (Ex. B, Second Am. Compl.)

On January 28, 1985, the Bankruptcy Court approved Bertsch & Company's "Application for Authority to Sell Real and Personal Property Free and Clear of Liens and Encumbrances." (Ex. 2, Peterson Aff. p.4, ¶ 1.) The court's Order directed the sale to proceed pursuant to the "Asset Purchase Agreement." (Ex. 2, Peterson Aff. p. 4, ¶ 2.) The purchase agreement provided that "Buyer is not purchasing or undertaking the assumption of any liabilities of the Seller." (Ex. 1, Peterson Aff. ¶ 1 c.) In the agreement. Bertsch & Company contracted to "indemnify and save harmless [Park Corporation against all of [Bertsch & Company's] liabilities incurred prior to or after the date of closing and all product liability for personal injury whenever a claim may arise with respect to all products shipped on or prior to the date of closing." (Ex. 1, Peterson Aff. ¶ 4.) The United States District Court, Southern District of Indiana, approved the Bankruptcy Court's Order "in all respects" on February 8, 1985. (Ex. 3, Peterson Aff.) On or about May 1985, Park Corporation ("Park") purchased for cash the assets of Bertsch & Company. (Peterson Aff. ¶¶ 6-16.) No stock was exchanged in the purchase. (Peterson Aff. ¶ 16.) Since that time, Park has had an unincorporated division called Bertsch; Bertsch has never been a/k/a "Bertsch &

Company." (Peterson Aff. ¶ 3.) Plaintiff's attorney in the underlying action acknowledged that Bertsch & Company had been administratively dissolved. (Ex. B, Defs' Mot. for Summ. J.) Neither Park nor its unincorporated division, Bertsch, were ever dissolved. (Defs.' Reply Br. in Supp. of its Mot. for Summ. J. [hereafter "Reply"], p.8, ¶ 3.). No officer director or shareholder of Bertsch & Company was ever an officer, director or shareholder of Park Corporation or of any of its divisions. (Peterson Aff. ¶ 5.) Park is a Nevada corporation with its principal place of business in Ohio. (Peterson Aff. ¶ 2.) Park/Bertsch did not manufacture, sell, service or repair the machine that was the subject of the underlying action. (Peterson Aff. ¶ 18.) The subject machine was manufactured, sold and shipped by Bertsch & Company in 1942. (Peterson Aff. ¶ 17).

On August 9, 1993, in the underlying action, the Plaintiff served "Bertsch & Company" with a copy of a summons and complaint. Service was by certified mail, return receipt requested, at Post Office Box 191. Cambridge City, IN. (Plaintiff's Mem. in Opp'n to Defs.' Mot. for Summ. J. [hereafter "Opp'n"] ¶ 1.) "This is also the current address for "Bertsch". (Opp'n ¶ 1.) Service was "refused" in the underlying action by Bertsch, and "return to sender" without being opened. (Opp'n ¶1 & Ex. A.) "Bertsch & Company" failed to answer, defend, or enter an appearance in the underlying action. (Opp'n ¶ 3.) Bertsch, the unincorporated division of Park, also failed to answer, defend, or enter an appearance. The Notice and Acknowledgment for Service by Mail was not signed. The Mississippi court found that "pursuant to Rule 4(c)(5) of the Mississippi Rules of Civil Procedure, Defendant Bertsch & Company was properly and sufficiently served by process through a receipt of the of the summons and complaint by certified mail, return receipt requested." (Ex. A. Second Am. Compl.) On March 18, 1994, the Mississippi court entered a default judgment against "Bertsch & Company. On August 15.1994 following a hearing on damages, the Mississippi court entered a Final Judgment against Bertsch & Company for $4,129,286.93. (Ex. 2, ¶ 11, Morton Aff.).

The Plaintiff is here to enforce this judgment. The Defendants argued in their May 3, 1995 motion to dismiss that the Plaintiff had won a judgment against a defunct corporation, and that to enforce the judgment against Park and its unincorporated division would offend basic principles of due process. A dispositive ruling on the motion to dismiss was deferred because the court was without the means to determine the question of whether privity existed between Park/Bertsch and Bertsch & Company. In its March 22, 1996 Entry deferring on Defendants' motion to dismiss and allowing conversion

to a motion for summary judgment, the court directed the parties to conduct limited discovery on the issue of whether privity existed between them. Lacking privity, the judgment cannot be afforded full faith and credit by this court.

II. DISCUSSION

In the case at bar, the Plaintiff asserts that genuine issues exist as to whether Defendant was properly served in the Mississippi action and whether the judgment rendered in the underlying action offends due process. Contrarily, the Defendant moves for summary judgment, arguing that because "Bertsch & Company" was served in the underlying action, because "Bertsch & Company" was the named defendant in the underlying action, because the underlying judgment was entered against "Bertsch & Company" and because there was no privity between Park/Bertsch and Bertsch & Company, fundamental due process principles dictate that the Mississippi judgment is not binding on Park/Bertsch.

A. Summary Judgment Standard

Perhaps the Seventh Circuit best stated the often repeated standard for summary judgment in *Howland v. Kilquist,* 833 F.2d 639 (7th Cir. 1987).

Fed. R. Civ. P.56(c) provides that a district court shall grant summary judgment if the pleadings, depositions answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. When the facts are disputed the parties must produce proper documentary evidence support their contentions, and may not rest on mere allegations in the pleadings, *Possey v. Skyline Corp.,* 702 F.2d 102, 105 (7th Cir.), cert. denied, 464 U.S. 960 (1983), or upon conclusory statements in affidavits. *First Commodity Traders v. Heinold Commodities, Inc.,* 766 F. 2d 1007, 1011 (7th Cir. 1985). In reviewing a grant of summary judgment, all reasonable inferences from the evidence presented must be drawn in favor of the opposing party. *Matsushita Electronics Indus. Co., Ltd. v. Zenith Radio Corp.,* 475 U.S. 574, 587 (1986)... The mere existence of a factual dispute will not bar summary judgment unless 'the disputed fact is outcome determinative under governing law.' *Egger v. Phillips,* 710 F.2d 292, 296 (7th Cir.) (en banc), cert. denied, 464 U.S. 918 (1983).

Id. at 642.

The Supreme Court further clarified the scope of Federal Rule of Civil Procedure 56 in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986) and *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). In Celotex, the Court held that the initial burden is on the moving party to demonstrate "with or without affidavits" the absence of genuine issues of material fact and that, absent such material facts, judgment should be granted as a matter of law in the moving party's favor. 477 U.S. at 323. Once the moving party has met its burden, the opposing party must "go beyond the pleadings" and designate specific facts to support or defend each element of the claim, demonstrating a genuine issue for trial. Id. at 322-23; *Becker v. Tenenbaum-Hill Assocs., Inc.*, 914 F.2d 107, 110 (7th Cir. 1990). Not every factual dispute creates a barrier to summary judgment, "[o]nly disputes over facts that might affect the outcome of the suit under the governing law will property preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." *Anderson*, 477 U.S. at 248.

Supplementing Rule 58, this district promulgated Local Rule 56.1 to establish procedures for summary judgment motions. Local Rule 56.1 requires the party moving for summary judgment to file a Statement of Material Facts and the party opposing the motion to file a Statement of Genuine issues "setting forth... all material facts as to which it is contended there exits a genuine issue necessary to be litigated." S.D. IND. L.R. 56.1. The effect of these requirements is apparent:

> In determining the motion for summary judgment, the Court will assume that the facts as claimed and supported by admissible evidence by the moving party an admitted to exist without controversy, of except to the extent that such facts are controverted in the "Statement of Genuine Issues" filed in opposition to the motion, as supported by the depositions, discovery responses, affidavits and other admissible evidence on file.

Id. Read together, Rule 56 and Local Rule 56.1 stand for the proposition that if the party opposing summary judgment fails to demonstrate the existence of a genuine issue of material fact, the facts offered by the movant, and contained in the record, are the basis of the summary judgment decision.

B. Full Faith and Credit Analysis

The Full Faith and Credit Act, 28 U.S.C. § 1735, "requires federal courts to give the same preclusive effect to state court judgments that those judgments would be given in the courts of the State from which the judgments emerged." *Marx v. M & I Bank of Watertown,* 17 F.3d 1012, 1014 (7th Cir. 1994) (quoting *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 466 (1982)); see also *Threshermen's Mut. Ins. v. Wallingford Mut. Ins. Co.,* 26 F. 3d 776, 781 (7th Cir. 1994) (and cases cited). Of course, the state preclusion law itself is subject to the limitations of due process, *Hansberry v. Lee,* 311 U.S. 32, 40 (1940), and a state court judgment is not entitled to full faith and credit in a second forum if that judgment was rendered without jurisdiction over either the person or the subject matter, or if due process were violated. *Id.* For example, evidence of lack of in personam jurisdiction will defeat subsequent enforcement of a foreign default judgment entered when defendant failed to make an appearance. *Hazen Research, Inc. v. Omega Minerals, Inc.*, 497 F.2d 151(5th Cir. 1974); *Sanders v. Humphrey,* 735 F. Supp. 209 (S.D. Miss. 1990) (Mississippi court not required to give full faith and credit to Louisiana judgment where rendering court did not have personal jurisdiction over Mississippi resident). Whether such jurisdiction existed in the first forum is subject to inquiry in the second forum. *Comprehensive Merchandising Catalogs, Inc. v. Madison Sales Corp.*, 521 F. 2d 1210, 1212 (7th Cir. 1975) (citing *Milliken v. Meyer*, 311 U.S. 457, 462 (1940)). Thus, the Mississippi judgment is not entitled to full faith and credit if the forum lacked personal jurisdiction over the Defendant.

C. Personal Jurisdiction

Personal jurisdiction contemplates the power of a court over the person of the defendant. A Mississippi court may exercise jurisdiction over a nonresident defendant only if: (1) the forum state's long-arm statute confers such jurisdiction; and (2) the exercise of such jurisdiction is consistent with due process under the United States Constitution. *Ham v. La Cienga Music Co.*, 4 F. 3d 413 (5th Cir. 1993). Therefore, even if jurisdiction is proper under the long-arm statute, a due process analysis must take place. If there is no basis for exercising jurisdiction under the state long-arm statute, however, then the court need not consider the question of due process.[1] *Smith* v.

---

[1] For the reasons stated below, the court has determined that personal jurisdiction over Park/Bertsch was not obtained in the underlying action. Had personal jurisdiction been conferred under the Mississippi long-arm statue, however, the following federal due process standard, as applied in the Court of Appeals for the Fifth Circuit and in Mississippi, would have been used.

DeWalt Prods. Corp., 743 F.2d 277, 278 (5th Cir. 1984) (due process issue not considered because personal jurisdiction lacking under Mississippi law). So, the first step in haling a nonresident defendant into court is satisfying the long-arm statute.

1. Long-Arm Statute

Mississippi's long-arm statute reads as follows:

> Any nonresident person, firm ...or any foreign or other corporation not qualified under the Constitution and laws of this state as doing business herein, who shall make a contract with a resident of this state to be performed in whole or in part by any party in this state,

---

Due process required that the nonresident defendant "have certain minimum contacts with [the forum state] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice' " *International Shoe v. Washington*, 326 U.S. 310, 316 (1945); *Administrators of the Tulane Educ. Fund v. Cooley*, 462 So. 2d 696, 704 (Miss. 1984), cert. denied, 474 U.S. 820 (1985). In other words, the nonresident must have committed some act or acts such that he can reasonable expect to be haled into the forum's court. Thus, the focus of the due process inquiry is on whether the nonresident, by virtue of his contact(s) with the forum state, can be said to have "purposely availed himself of the benefits and protections of the forum. *Burger King Corp. v. Rudzeicz*, 471 U.S. 462, 475 (1985). "The minimum contacts the Constitution requires depend on whether the court is asserting specific or general jurisdiction." *Villar v. Crowley Maritime Corp.*, 990 F. 2d 1489, 1489 (5th Cir. 1993).

Specific jurisdiction exists where the action arises from the defendant's purposeful forum-related activity. *Ruston Gas Turbines, Inc. v. Donaldson Co.*, 9 F. 3d 415, 419 (5th Cir. 1993). A single act by the defendant directed at the forum state may be sufficient to confer specific jurisdiction if that act gives rise to the claim being asserted. Ruston Gas Turbines, 9 F. 3d at 319; *Sorrells v. R&R Custom Coach Works*, 638 So. 2d 668, 673 (Miss. 1994). However, "[w]hile a single contact can be a sufficient basis upon which to predicated specific jurisdiction, that single contact must be 'purposeful,' and directed at the forum." *Mason v. Shelby County Health Care Corp.*, 919 F. Supp. 235, 238 (S.D. Miss. 1996). In contrast, where the suit arose from an act unrelated to the defendant has "contacts with the forum, general jurisdiction is proper where the defendant has "continuous and systematic contacts" with the forum. *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408 (1984); *Thompson v. Chrysler Motors Corp.*, 755 F. 2d 1162, 1171 (5th Cir. 1985); Sorrells v. R&R Custom Coach Works, 636 So. 2d at 673 (Miss. 1994).

or who shall commit a tort in whole or in part in this state against a resident or nonresident of this state, or who shall do any business or perform any nonresident person firm... or any foreign or other corporation not qualified under the character of work or service this state, shall by such act or acts be deemed to be doing business in Mississippi and shall thereby be subjected to the jurisdiction of the court of this state.

Miss. Code Ann. § 13-3-57 (Supp. 1995). This broad statute allows Mississippi courts to exercise jurisdiction over nonresident defendants whose conduct within the state has caused an alleged injury (specific jurisdiction), and over nonresident defendant who have purposely availed themselves of the protection of the laws of the state of Mississippi (general jurisdiction). *McLaurin v. Nazar*, 883 F. Supp. 112, 113 (N.D. Miss. 1995).

a. General Jurisdiction

A finding of general jurisdiction that the Defendant's contacts "must amount to something more than occasional 'fortuitous' instances where the defendant had in the past come into some casual, isolated contact with an instate resident." *Alpaugh v. Moore* 568 So. 2d 291, 294 (Miss. 1990). Here, there is no contention that Park/Bertsch had "sufficient systematic and continuous" contacts with Mississippi to support an exercise of general jurisdiction. Indeed, it is likewise uncontested that neither Park nor Bertsch is qualified to do business in Mississippi; that neither had a designated agent in Mississippi for service of process; and that neither created or maintained continuing obligations with the residents of Mississippi. See *Sorrels*, 636 So. 2d at 672.

In fact, the only allegation to tie Park/Bertsch to the forum, is the purchase of assets from Bertsch & Company. This does not rise to the level of "systematic and continuous." Based on this transaction alone, Park/Bertsch could not have reasonably foreseen being haled into a Mississippi court. The Mississippi court, therefore, did not have general Jurisdiction over Park/Bertsch.

b. Specific Jurisdiction

While general jurisdiction requires "systematic and continuous" contacts with the forum, specific jurisdiction may be founded upon a single transaction that satisfies at least one prong--"tort", "contract", or "doing business"--of the long-arm statute. *McLaurin*, 833 F. Supp. at 113. The parties agree that the underlying

action was predicated on the tort-prong of the Mississippi long-arm statute. Further, the Defendant's uncontested facts establish that Park/Bertsch had no dealings with respect to the offending machine; therefore, it is unnecessary for the court to analyze the "doing business" and "contract" prongs. *See Peterson V. Test Int'l, E.C.*, 904 F. Supp. (S.D. Miss. 1995).

Although a single act under the tort-prong is enough to confer jurisdiction, the tort complained of in the underlying action did not arise from even a single act by Park/Bertsch. Rather, the tort arose from actions undertaken by Bertsch & Company. Indeed, in filing the original action, Plaintiff invoked the tort-prong of the Mississippi long-arm statute naming only Bertsch & Company as the tortfeasor. However, Plaintiff's Memorandum in Opposition to Defendants' Motion for Summary Judgment argues that the tort-prong also confers jurisdiction over Park/Bertsch. Nonetheless, however, nowhere did the trial court's default judgment mention Park/Bertsch or any acts by Park/Bertsch. Rather, the court specifically found only that it had "personal jurisdiction over Defendant Bertsch & Company" because it committed a tort in Mississippi and only that "Bertsch & Company had sufficient 'minimum contacts' with the State of Mississippi such that the exercise of personal jurisdiction over Bertsch & Company [was] proper and constitutional." Also, as Defendant notes, the attorney in the underlying action clearly represented to the Mississippi court that the judgment was sought against the "dissolved" "Bertsch & Company" as opposed to Park's unincorporated division.

While the Mississippi trial court may have rightfully found that *Bertsch & Company* committed a tort in Mississippi, it is uncontroverted that Park/Bertsch did not manufacture, sell, upgrade, repair, or service the offending product in Mississippi. In other words, Park/Bertsch did not commit any act in Mississippi relevant to the underlying tort; therefore, it could not be made amenable to jurisdiction in Mississippi based on the long-arm statute. Moreover, even if the long-arm statute applied, since Park/Bertsch did not purposely direct its activities towards Mississippi -- in fact no activity is alleged - - use of the long-arm statute to gain personal jurisdiction would offend due process. *Sorrells,* 636 So. 2d at 675.
All may not be lost by the Plaintiff, however. One strand of hope remains. Even though Park/Bertsch was not a named party in the underlying suit and did not commit the tort in Mississippi, in personam jurisdiction could be had if Park/Bertsch were Bertsch & Company's privy.

c. Privity

As the court noted in its prior Entry, Mississippi law should govern the question of privity. It appears, however, that both Mississippi and Indiana follow the general rules with regard to the liability of a corporation that has purchased another corporation's assets. Consequently, the analysis would be the same under the law of either jurisdiction.

Under this analysis, due process principles would not be offended if the Plaintiff established that Park, or Bertsch, its unincorporated division, were in privity with Bertsch & Company. See, e.g., *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 327 n.7 (1979); see also *Rouse Constr., Inv. v. Transamerica Ins. Co.*, 750 F.2d 1492 (11th Cir. 1985) (determining that Mississippi judgment was entitled to full faith and credit only when defendant was a party or privy to Mississippi action). Indeed, Mississippi's preclusion law, like the law of many jurisdictions, requires identity of parties or their privies before a judgment is given preclusive effect. Thus, given the lack of personal jurisdiction over Park/Bertsch, a Mississippi court could enforce this judgment against them only if it found that privity existed between Park/Bertsch and Bertsch & Company. See, e.g., Johnson v. Howell, 592 So. 2d 998, 1001 (Miss. 1991) (stating rule of res judicata as a "final judgment on the merits preclud[ing] the parties and their privies from relitigating claims that were or could have been raised in that action.").

It is clear that Park/Bertsch was not in privity with, nor a successor in interest of, Bertsch & Company. Rather, Park/Bertsch merely purchased the assets of Bertsch & Company in an all cash deal. *MacMillan Bloedel Ltd. v. Flintkote Co.*, 760 F.2d 580 (5th Cir. 1985) (mere purchase of assets does not constitute merger from which privity may be found); *Leannis v. Cincinnati, Inc.*, 565 F.2d 437, 439 (7th Cir. 1977) (transferee of assets generally not liable for liabilities of predecessor). Further, Park/Bertsch could not be found liable for Bertsch & Company's liabilities since there was (1) no express assumption of liability; (2) no merger or indication of de facto merger; (3) no unity of officers, director or shareholders, *i.e.*, no mere continuation of Bertsch & Company; and (4) no transfer of assets for the fraudulent purpose escaping liability for the seller's obligations. *Mozingo v. Correct Mfg. Corp.*, 752 F.2d 168,174-76 (5th Cir. 1955) (applying Mississippi law). This general rule of nonliability of the purchasing corporation for the liabilities of the selling corporation is also applicable to product liability claims asserted by a third party against the purchasing corporation.

Mozingo, 752 F.2d at 176; *Travis v. Harris,* 565 F.2d 443, 448-50 (7th Cir. 1977). However, although not directly argued by the Plaintiff, the Plaintiff recitation of facts could suggest a "product line" or "continuity of enterprise" exception to this general rule of nonliability. To the extent this argument might be made, however, it is without merit, for many jurisdictions, including Mississippi and Indiana, have renounced or not accepted these exceptions. *Page v. Gulf Oil Co.*, 812 F. 2d 249 (5th Cir. 1987) (Neither Texas nor Louisiana follows product line exception); *Mozingo,* 752 F.2d at 175 (no Mississippi authority for product line exception); *Travis,* 565 F.2d at 447-48 (Indiana does not follow "product line" theory of successor liability for defects in product made by predecessor). Further, given the lack of continuity of officers, directors and shareholders; the existence of other defendant's in the underlying action; and the imminent pendency of the bankruptcy proceeding independent from the purchase of assets; the exceptions are not applicable in any event. See *Nelson v. Tiffany Indus., Inc.* 778 F. 2d 533 (9th Cir. 1985) (continuity of enterprise exception applicable only where successor corporation "played some role in curtailing or destroying plaintiffs' remedies").

Lack of privity is further evidenced by the bankruptcy and district courts' approval of the asset purchase "without assumption of liability." Indeed, this alone may have preclusive effect to deny the Mississippi court jurisdiction under the bankruptcy code pursuant to the Supremacy Clause of the United States Constitution. See, e.g., *L.F. Rothschild & Co., Inc. v. Angier,* 84 B.R. 274, 275 (D. Mass. 1988) ("notwithstanding the Full Faith and Credit Statute, a bankruptcy discharge may operate to void subsequent state judgments"). In fact the judgment itself may be void as a matter of law.[2] *In Re A.H. Robbins Co.* 63 B.R. 986,

[2] The Plaintiff protests that the Defendant is trying to set aside the judgment itself and that it can only do so in the Mississippi court; therefore, this court cannot entertain Defendant's summary judgment motion. This argument is misguided in that the Defendant is only asking that the Mississippi judgment not be afforded full faith and credit. Plaintiff knows as evidenced by his own request that the court enforce the judgment that such a finding is well within the jurisdiction of this court. Further, as noted above and in the court's previous entry, the bankruptcy proceeding may have rendered the Mississippi judgment void as a matter of law. However, Plaintiff chose not to address this issue; and the court, having found no personal jurisdiction, need not decide it today. Therefore, the likely granting of Defendants summary judgment motion will not affect the Mississippi judgment. Instead, Defendant if he chooses, must attack the judgment in Mississippi court as outlined by Plaintiff.

993 (Bankr. E.D. Va. 1988) (tortious event occurred pre-petition and therefore, though post-petition harm was claimed, claim was discharged).

Finally, the court's March 22, 1996, entry strongly hinted that, Plaintiff had to prove privity in order survive a motion for summary judgment. Plaintiff, however, did not even attempt to prove privity or to contest Defendant's proof of lack of privity. Because Plaintiff failed to demonstrate the existence of a genuine issue of material fact regarding privity, the court accepts as a matter of law that Park/Bertsch was not in privity with Bertsch & Company.

2. Due Process

Having found no basis under the Mississippi long-arm statute for exercising jurisdiction over the Defendant, the court need not consider the question of due process. *Smith,* 743 F.2d at 278. Therefore, it is not necessary to "examine the relationship among the defendant, the forum, and the litigation to determine whether maintaining the suit offends traditional notions of fair play and substantial justice. "*Southmark Corp. v. Life Investors, Inc.,* 851 F.2d 763, 772 (5th Cir. 1988). Likewise, because proper service will not cure a lack of personal jurisdiction, the court need not even address the sufficiency of service of process. Similarly, without personal jurisdiction, the judgment of the Mississippi court is not entitled to full faith and credit. *World-Wide Volkswagen Corp. v. Woodson,* 444 U.S. 286, 291 (1980).

Accordingly, because Mississippi did not have personal jurisdiction over Park/Bertsch, it is irrelevant if due process was afforded or not; therefore, Plaintiff failed to establish the existence of any genuine issues of material fact that would preclude granting Defendant's motion for summary judgment.

III. CONCLUSION

For the reasons stated above, the court is likely to grant Defendant's motion for summary judgment. However, Plaintiff requests oral argument. The request is GRANTED. At argument, counsel will have the opportunity to explain whether the court's view on theses matters is correct. The Plaintiff will proceed first at argument and the Defendant(s) may respond. The Plaintiff may then reply.

The argument will be held in room 307, U.S. Courthouse at 9:00 a.m., on Friday, September 27, 1996.

ALL OF WHICH IS ENTERED this 18th day of September 1996.

/s John Daniel Tinder, Judge
United States District Court

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UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

JUDGMENT - WITH ORAL ARGUMENT

Date: August 29, 1997

BEFORE: Hon. Frank H. Easterbrook, Circuit Judge
Hon. Michael S. Kanne, Circuit Judge
Hon. Terrence T. Evans, Circuit Judge
NO. 96-3676

JERRY JEFFERSON,
Plaintiff-Appellant,

v.

BERTSCH, also known as
BERTSCH & COMPANY, and
PARK CORPORATION,
Defendants-Appellees

Appeal from the United States District Court for the
Southern District of Indiana, Indianapolis Division
No. 95 C 177, John D. Tinder, Judge

The judgment of the District Court is AFFIRMED, with costs, in accordance with the decision of this court entered on this date.

(1061-110393)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

JERRY JEFFERSON,	)	
	)	
	)	
Plaintiff,	)	
	)	
	)	IP 95-0177-C-T/G
vs.	)	
	)	
	)	
	)	
BERTSCH *a/k/a* BERTSCH & COMPANY and PARK CORPORATION,	)	
	)	
	)	
	)	
Defendants.	)	

JUDGMENT

This matter having come before the court on Motion of Park Corporation and Bertsch its Unincorporated Division for Summary Judgment and the court having read the parties' briefs, having listened to the parties' oral arguments having fully considered the matter, and having made its Entry, now GRANTS the Defendants' Motion for Summary Judgment.

Judgment is now entered in favor of the Defendants Park and Bertsch, its unincorporated division, and against the Plaintiff on Plaintiff's Second Amended Complaint. It is ORDERED, ADJUDGED, and DECREED that the Plaintiff is not entitled to enforcement against these Defendants of the judgment obtained by the Plaintiff against "Bertsch & Company" in the Circuit Court of the First Judicial District of Hinds County, Mississippi, on August 15, 1994.

ALL OF WHICH IS ORDERED this 7th day of October 1996.

s/ John Daniel Tinder, Judge
United States District Court

Clerk
United States District Court
s/ Kent A. Halhandath
By Deputy Clerk
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IN THE CIRCUIT COURT OF THE FIRST JUDICIAL DISTRICT
OF HINDS COUNTY, MISSISSIPPI

JERRY JEFFERSON — PLAINTIFF

VS. — CIVIL ACTION NO. 93-76-193

BERTSCH & COMPANY, WESTINGHOUSE ELECTRIC CORPORATION, INC., GENERAL ELECTRIC COMPANY, FURNAS ELECTRIC COMPANY AND DOES 1-20 — DEFENDANTS

FINAL JUDGMENT

This matter came on for a full hearing before the Court on July 19, 1994 for the purpose of determining damages, and the Court, after hearing testimony and being fully advised in the premises does find, order and adjudge as follows:

1. This Court has personal jurisdiction over Defendant Bertsch & Company pursuant to Miss. Code Ann. § 13-3-57, as the Court finds that Bertsch & Company committed a tort in whole or in part within the State of Mississippi. This Court further finds that Defendant Bertsch & Company had sufficient "minimum contacts" with the State of Mississippi such that the exercise of personal jurisdiction over Bertsch & Company is proper and constitutional.

2. Pursuant to Miss. Code Ann. § 11-11-3, venue is proper in the Circuit Court of the First Judicial District of Hinds County, Mississippi, because one or more of the co-defendants can be found in Hinds County, Mississippi.

3. On August 9, 1993, pursuant to Rule 4(c)(5) of the Mississippi Rules of Civil Procedure, Defendant Bertsch & Company was properly and sufficiently served with process through receipt of a copy of the summons and complaint by certified mail, return receipt requested.

4. More than thirty days elapsed and Defendant Bertsch & Company failed to answer, defend, plead, respond or otherwise enter an appearance. In accordance with Rule 55 of the Mississippi Rules of Civil Procedure, Plaintiff filed an Application To Clerk For Entry of Default And Supporting Affidavit on December 16, 1993. On said

date, an Entry of Default was entered by Barbara Dunn, Circuit Clerk, Hinds County, Mississippi. The Court finds that this Entry of Default was proper.

5. On March 18, 1994, this Court held a hearing. After reviewing all pertinent matters, this Court found that Defendant Bertsch & Company had been properly and sufficiently served pursuant to Rule 4 of the Mississippi Rules of Civil Procedure, and that Defendant Bertsch & Company had failed to answer, defend, plead, respond, or otherwise enter an appearance. Therefore, a default judgment was duly entered against Defendant Bertsch & Company as to liability only. Notice of said hearing was not required because Defendant Bertsch & Company had failed to answer, plead, defend, respond, or otherwise enter an appearance.

6. On July 19, 1994, the Court held a hearing to determine damages in connection with the Default Judgment which had been entered as to liability only. Testimony was presented on the issue of damages by Plaintiff Jerry Jefferson, Nathaniel Fentress, Dr. Timothy Summers and Stephanie Maddox, C.P.A., and the Court entertained argument from Plaintiff's counsel.

7. After considering all the testimony presented and having been fully advised in the premises, the Court finds that Plaintiff Jerry Jefferson proved by a preponderance of the evidence the following damages: Past medical expenses -$143,575.04; Past Psychiatric Care - $1,220.00; Future medical expenses and other related expenses -, $319,613.89; Past, present and future lost wages - $179,978.00; Pain and Suffering - $2,500,000.00; and Loss of Enjoyment of Life - $1,000,000.00.

8. This Court therefore assesses and awards total damages to the Plaintiff Jerry Jefferson in the amount of $4,144,286.93.

9. The Court finds that Bertsch & Company is entitled to a setoff in the amount of $15,000.00 representing the total settlement amount paid collectively by Defendants Westinghouse Electric Corporation, Inc., General Electric Company, and Furnas Electric Company.

There being no further cause to delay entry of final judgment:

IT IS THEREFORE ORDERED AND ADJUDGED that the Plaintiff Jerry Jefferson shall have and hereby is granted final

judgment from and against Bertsch & Company in the total amount of $4,129,286.93, with interest to accrue on said amount at 8% per annum as of the date of entry of this final judgment.

IT IS FURTHER ORDERED that the Clerk of this Court shall tax all costs against the Defendant, Bertsch & Company.

SO ORDERED AND ADJUDGED this the 15th day of August, 1994.

s/ James E. Graves, Jr.
CIRCUIT COURT JUDGE

Submitted By:

Dennis C. Sweet III, Esq.
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(2)

No. 97-914

Supreme Court, U.S.
FILED
JAN 30 1998
CLERK

In The Supreme Court of the United States

October Term, 1997

JERRY JEFFERSON,

Petitioner,

v.

BERTSCH A/K/A BERTSCH & COMPANY, AND PARK CORPORATION,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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No. 97-914

In The Supreme Court of the United States

October Term, 1997

JERRY JEFFERSON,

Petitioner,

v.

BERTSCH A/K/A BERTSCH & COMPANY, AND PARK CORPORATION,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

PERCEIVED MISSTATEMENTS OF FACT

Pursuant to Rule 15, Section 2, the following are perceived misstatements of fact in the petition for writ of certiorari.

A. Contrary to Petitioner's assertion, the judgment in the Mississippi action was not entered against Park Corporation or Bertsch, its unincorporated division. It was entered only against Bertsch & Company.

On page 8, Petitioner asserts: "The Mississippi Judgment is against Bertsch, not the dissolved Bertsch & Company." This is contrary to the Final Judgment entered in the Mississippi Action (29a).[1] In that Final Judgment, which was submitted by Petitioner's counsel, the Court held it had, "Personal jurisdiction over Defendant Bertsch & Company" because "Bertsch & Company committed a tort in whole or in part within the State of Mississippi. (Id ¶ 1) The court found that Bertsch & Company was properly served (Id ¶ 3), and entered judgment against Bertsch & Company (31a). Nowhere in that final judgment is there any mention or reference to Park Corporation or Bertsch its unincorporated division. (29-31a)

The Seventh Circuit held: " . . . the Judgment of the Circuit Court of Hinds County, Mississippi was against Bertsch & Company, not Park/Bertsch." (5a).[2] The District Court also held that judgment was entered only against Bertsch & Company. (7a, 15a)

In making this determination, the Seventh Circuit stated, "Moreover, Jefferson plainly represented to the Mississippi court that the judgment was sought against the 'dissolved' 'Bertsch & Company' as opposed to asking for a judgment against Park/Bertsch." (4a)

The District Court made the same conclusion. In its first Entry, the District Court found: "Also as Defendant notes, the

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[1]References to (a) are to the page of the appendix attached to the Petition.

[2]Because the courts below referred to Park Corporation and its unincorporated division, named Bertsch, as "Park/Bertsch," that same terminology is used in this brief.

attorney in the underlying action clearly represented to the Mississippi Court that the judgment was sought against the 'dissolved' 'Bertsch & Company' as opposed to Park's unincorporated division." (21a) In its second Entry, it stated, "In the instant case, however, the Plaintiff certified to the Mississippi court that it was seeking judgment against 'Bertsch & Company' a 'dissolved' corporation." (11a)

These rulings are based on the fact that Petitioner's counsel, to obtain a default judgment against Bertsch & Company, filed an affidavit in which he swore under oath that service was made on Bertsch & Company, which was "administratively dissolved," and that Petitioner was seeking judgment against Bertsch & Company. (See Appendix B-1 attached hereto.)

In light of this affidavit of Petitioner's counsel and based on the language of the Final Judgment, which was submitted by Petitioner's counsel, there is no basis to assert that the Mississippi judgment is against Bertsch and not the dissolved Bertsch & Company. Also, this assertion is directly contrary to the facts, which are correctly stated in the first full paragraph on page 3 of the Petition, which states:

> *Bertsch & Company* did not answer, defend, plead, respond, or otherwise enter an appearance in the Mississippi state court action. Subsequently on December 16, 1993, default was entered against *Bertsch & Company* by the Circuit Clerk of Hinds County, Mississippi, pursuant to Rule 55 of the Mississippi Rules of Civil Procedure. On March 18, 1994, the Mississippi state court judge entered an Order Granting Default Judgment as to liability against *Bertsch & Company*. On July 19, 1994, a full hearing was held before the Hinds County Circuit Court. The Circuit Court for the First Judicial District of Hinds County, Mississippi, found that said court had personal jurisdiction over *Bertsch & Company*. The Mississippi trial court further found that *Bertsch & Company* had sufficient "minimum contacts"

with the State of Mississippi. Also, the Mississippi trial court heard testimony as to damages and granted a final judgment from and against *Bertsch & Company* in the amount of $4,129,286.93, with interest to accrue at 8% from entry of said judgment. (Emphasis added)

B. Contrary to Petitioner's assertion, the division of Park Corporation named Bertsch was never a/k/a Bertsch & Company.

Petitioner repeatedly refers to Park's division as "Bertsch a/k/a Bertsch & Company." This is directly contrary to the District Court's first Entry, where it held that "Park has had an unincorporated division called Bertsch; Bertsch has never been a/k/a 'Bertsch & Company.' " (14-15a) Petitioner never questioned or disputed this finding and never submitted any evidence, by affidavit or otherwise, to dispute it or to support its assertion, which is incorrect.

C. Contrary to Petitioner's assertion, Park/Bertsch did not manufacture, sell, service or repair the roller machine involved.

Petitioner on page 2 under the heading Factual Background asserts that Jefferson was injured by a roller machine due to its "defective design, and the negligence, misrepresentations, conduct and breaches of warranty(ies) of Bertsch a/k/a Bertsch & Company." This is a misstatement because, as shown above, Bertsch was never a/k/a Bertsch & Company, and Park/Bertsch did not manufacture, sell, service or repair the roller machine. As stated by the Seventh Circuit: " . . . it is uncontroverted that Park/Bertsch did not manufacture, sell, upgrade, repair or service the offending product in Mississippi." (4a) To the same effect are the District Court's opinions at 7a and 15a. The machine was manufactured and sold by Bertsch & Company in 1942 (15a).

ARGUMENT

I. The Petition Does Not Meet the Considerations Governing Review on Certiorari.

The Petition does not meet any of the considerations enumerated in Rule 10. Petitioner ignores the fact that the District Court and the Seventh Circuit Court held (1) that the Mississippi judgment was entered only against Bertsch & Company and (2) since the Mississippi court did not have jurisdiction over Park/Bertsch, the judgment entered by the Mississippi court was not entitled to full faith and credit as to Park/Bertsch (3-5a; 7-11a; 20-21a). Instead Petitioner argues that the federal courts had a limited scope of review in determining whether a judgment should be enforced, citing *Underwriters Nat'l Assurance Co. v. North Carolina Life and Accident and Health Ins., Guar., Assoc.*, 455 U.S. 691 (1982) (Petition at 9, 11). In that case, this Court reiterated the fundamental rule:

> Consequently, before a court is bound by the judgment rendered in another State, it may inquire into the jurisdictional basis of the foreign court's decree. If that court did not have jurisdiction over the subject matter or the relevant parties, full faith and credit need not be given.

455 U.S. at 705.

This is exactly what the lower courts did, as shown by their holdings that

> 1. In the Mississippi action, Jefferson sued Bertsch & Company, which it identified in the complaint as an Indiana corporation. (1a, 13a)
>
> 2. Bertsch & Company manufactured and sold the product involved in 1942. (15a) It was dissolved in 1987. (2a, 14a)
>
> 3. When the defunct Bertsch & Company did not respond to the complaint, judgment was entered against it. (2a, 15a) To

obtain this default judgment, Petitioner's attorney plainly represented to the Mississippi court that the judgment was sought against the dissolved Bertsch & Company, not Park/ Bertsch. (4a, 11a, 21a)

4. Petitioner sought to enforce this judgment against Park/ Bertsch (2a). Park Corporation is a Nevada corporation, and neither Park nor its division were ever dissolved (15a). Park/Bertsch and Bertsch & Company are two distinct companies (5a).

5. Park/Bertsch did not manufacture, sell, repair or service the machine involved and did not commit a single act in Mississippi with regard to the product. (4a, 9a, 11a, 21a).

6. In the Mississippi Action, jurisdiction over Bertsch & Company was based on the tort prong of its long-arm statute. (1a, 4a, 14a)

7. The Mississippi court made no findings regarding its personal jurisdiction over Park/Bertsch. (4a)

8. The Mississippi court did not have personal jurisdiction over Park/Bertsch. (5a, 7a, 11a)

9. Since there was no personal jurisdiction over Park/ Bertsch , the judgment is not entitled to full faith and credit. (5a, 7a)

Ignoring the holdings that the Mississippi court did not have personal jurisdiction over Park/Bertsch and that the judgment was entered only against Bertsch & Company, Petitioner cites *Matsushita Elec. Industrial Co. Ltd. v. Epstein,* 116 S. Ct. 873 (1996), for the proposition that the Full Faith and Credit Act directs courts to treat a state court judgment the same as it would receive in the state rendering it and that federal courts may not employ their own rules in determining the effects of state judgments, but must employ the rules of Mississippi. (Petition at 5). This is exactly what the Seventh Circuit did. It noted that the

Mississippi courts have held that if the court rendering the judgment did not have jurisdiction over the person, that judgment was not entitled to full faith and credit (citing *Sanders v. Humphrey,* 735 F. Supp. 209 (S.D. Miss. 1990) (holding that a Mississippi state court was not required to give full faith and credit to a Louisiana judgment where the rendering court did not have personal jurisdiction over the Mississippi resident); *Peters v. Peters,* 560 So. 2d 722, 723 (Miss. 1990) (holding that "if the court is without jurisdiction—subject matter or personal—no one is bound by anything the court may say regarding the (de)merits of the case"). (3a)

Petitioner does not address the question of full faith and credit where the court entering the judgment lacked jurisdiction over the person. The *Matsushita* case only ruled on the question whether full faith and credit must be applied to a state court judgment approving a class action settlement where the settlement released claims which were within the exclusive jurisdiction of the federal courts. The parties who were contesting full faith and credit were members of the class and never opted out of the class. Thus, being parties to the underlying case, they were bound by the state court settlement.

Likewise, *Kremer v. Chemical Construction Corp.,* 456 U.S. 461 (1982) (cited on p. 5) did not involve the issue of jurisdiction. That case held that since Kremer had litigated his claim of employment discrimination with state agencies and in the state's courts, their decisions against Kremer were res judicata in a subsequent federal suit based on Title VII.

Petitioner's argument that Park/Bertsch should have gone to the Mississippi court to set aside the default judgment misses the mark. As noted in the comments to Rule 55 of the Mississippi Rules of Civil Procedure, only the defendant can seek to set aside a default judgment, and he must do so under Rule 60(b). However, Rule 60(b) may only be invoked by the party against

whom the judgment is rendered or that party's representative. As discussed above, the Mississippi judgment was rendered only against Bertsch & Company. It was not against Park/Bertsch. Therefore, Park/Bertsch had no duty or obligation to seek to set it aside and, under the Rules, had no standing to do so.

Because the Seventh Circuit applied the appropriate law in determining that the judgment is not entitled to full faith and credit, the writ does not meet any of the criteria specified in Rule 10, and there is no compelling reason to grant the writ.

II. There Was No Misnomer.

Even though all of the pleadings in the Mississippi action named only Bertsch & Company, the final judgment was entered only against Bertsch & Company, based on jurisdiction over Bertsch & Company having committed a tort in Mississippi, and Petitioner's attorney swore under oath that Petitioner was seeking a judgment against the "dissolved" Bertsch & Company, Petitioner argues that suing Bertsch & Company was a misnomer, citing *Campbell & Campbell v. Pickens Bank*, 99 So. 378 (Miss. 1924). The District Court aptly demonstrated why this case is not applicable, when it held:

> In *Campbell*, the correct party was incorrectly named and served. This is a classic example of a "misnomer." In the instant case, however, the Plaintiff certified to the Mississippi court that it was seeking judgment against "Bertsch & Company" a "dissolved" corporation. Therefore, when Bertsch , an unincorporated division of Park, was served, it was the incorrect party being served with process labeled with the correct party's name. This is not a misnomer. Misnomer or not, however, the key distinction between *Campbell* and the instant case is that Pickens Bank is subject to in personam jurisdiction by virtue of its presence in the forum. Indeed, Plaintiff's counsel in the instant case conceded at

> the hearing that *Campbell* was a service-of-process case and not a personal-jurisdiction case.

(See11a)[3]

Likewise, in *Rich v. Nevels*, 578 So. 2d 609 (Miss. 1991), the defendant was subject to personal jurisdiction. In that case, Nevels was attacked and injured when she was burglarized as a resident of a boarding house owned by Wilma Rich, whom Nevels sued. The summons incorrectly identified Wilma Rich as Wilma Richie. Wilma Rich acknowledged to the sheriff that she was indeed the person named in the summons. The sheriff asked her if she was Wilma Richie and she said yes. Rich also admitted that she knew Nevels and remembered the attack. Therefore, the court concluded that the evidence did not support a claim that the slight misnomer misled Rich. 578 So. 2d at 613.

Unlike *Nevels*, Park/Bertsch never acknowledged that it was the Bertsch & Company named in the summons, and because Park Corporation did not manufacture the machine, it had no knowledge of any of the matters asserted in the complaint in the Mississippi action. Therefore, the *Nevels* case has no bearing on this case, which factually is clearly distinguishable.

Even if, as Petitioner claims, there was a misnomer, then he had a duty to correct it in the Mississippi action. In *Rich v. Nevels, supra*, and in *Southern Trucking Service, Inc. v. Mississippi Sand and Gravel, Inc.*, 438 So. 2d 321, 323 (Miss. 1986), the courts held that if there is a misnomer, the proper procedure is for the party who made the misnomer to move to correct that misnomer in the court in which the suit is pending. This was never done by Petitioner.

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[3]The Seventh Circuit in its opinion did not discuss the *Campbell* case, but did find that Petitioner plainly represented to the Mississippi Court that the judgment was sought against the dissolved Bertsch & Company as opposed to asking a judgment against Park/Bertsch. (4a)

III. The Seventh Circuit Was Correct in Holding that the Mississippi Court Had No Jurisdiction Over Park/Bertsch.

A review of the opinion of the Seventh Circuit shows that it applied the correct law to the facts and found the Mississippi judgment was not entitled to full faith and credit because the court had no jurisdiction over Park/Bertsch. The conclusion of the Seventh Circuit is correct because:

- Petitioner is unable to demonstrate that Park/Bertsch was subject to suit under the Mississippi long-arm statute. (4a)

- In the Mississippi action, personal jurisdiction over Bertsch & Company was based on the tort prong of the long-arm statute. (4a)

- The tort complained of in the Mississippi action did not arise from any acts committed by Park/Bertsch. (4a)

- The Mississippi court made no findings regarding personal jurisdiction over Park/Bertsch. (4a)

- Petitioner plainly represented to the Mississippi court that the judgment was sought against the "dissolved" "Bertsch & Company", and not against Park/Bertsch. (4a)

- Since it was uncontroverted that Park/Bertsch did not manufacture, sell, upgrade, repair or service the machine involved, Park/Bertsch did not commit any act in Mississippi relevant to the underlying tort. (4a)

- The Mississippi court's finding of personal jurisdiction over Bertsch & Company did not render personal jurisdiction over Park/Bertsch. (5a)

- The Mississippi court did not have personal jurisdiction over Park/Bertsch. (5a)

- The judgment is entitled to full faith and credit only against Bertsch & Company. (5a).

CONCLUSION

For all of the above reasons the Petition for Writ of Certiorari should be denied.

Respectfully submitted,
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Counsel of Record

No. 97-914

In The Supreme Court of the United States

October Term, 1997

JERRY JEFFERSON,

Petitioner,

v.

BERTSCH A/K/A BERTSCH & COMPANY, AND PARK CORPORATION,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

APPENDIX

IN THE CIRCUIT COURT OF THE FIRST JUDICIAL DISTRICT
OF HINDS COUNTY, MISSISSIPPI

JERRY JEFFERSON — PLAINTIFF

vs. — CIVIL ACTION NO. 93-76-193

BERTSCH & COMPANY, WESTINGHOUSE ELECTRIC CORPORATION, INC., GENERAL ELECTRIC COMPANY, FURNAS ELECTRIC COMPANY AND DOES 1-20 — DEFENDANTS

AFFIDAVIT OF DENNIS C. SWEET III

STATE OF MISSISSIPPI

COUNTY OF HINDS

Dennis C. Sweet III, being duly sworn, states under oath as follows:

1. I am an adult resident citizen of Hinds County, Mississippi, and have personal knowledge of the facts set forth herein, am competent to testify to the facts set forth herein, and am an attorney for the Plaintiff, Jerry Jefferson.

2. On August 9, 1993, pursuant to Rule 4 (c)(5). Defendant Bertsch & Company was served with a copy of the summoms and complaint herein, by certified mail. Because Bertsch & Company was administratively dissolved by the Indiana Secretary of State in 1987, the summons and complaint was served upon an Officer or Managing Agent. As evidenced by a copy of the envelope attached hereto as Exhibit "A", the summons and complaint was "Refused." Attached hereto as Exhibit "B" is a true and correct copy of the executed Summons and Notice And Acknowledgment For Service By Mail which was served upon Defendant Bertsch & Company.

3. Service upon Defendant Bertsch & Company became effective on August, 9, 1993, this being the date in which the certified letter containing the summons and compliant was delivered.

4. More than thirty (30) days have elapsed since the date Defendant Bertsch & Company was served with the summons and complaint.

5. Defendant Bertsch & Company has failed to plead, respond, answer or otherwise defend as to the Plaintiff's Complaint, or serve a copy of any pleading upon the Plaintiff's counsel.

6. This affidavit is executed in accordance with Rule 55(a) of the Mississippi Rules of Civil Procedure for the purpose of enabling the Plaintiff to obtain an entry of default against Defendant Bertsch & Company for the latter's failure to plead or otherwise defend the Plaintiff's Complaint.

FURTHER AFFIANT SAYETH NOT.

/s/ Dennis C. Sweet III

DENNIS C. SWEET III

Attorney for JERRY JEFFERSON

Sworn to and subscribed before me personally on this the 16th day of December, 1993.

/s/ Virginia Kewery

Notary Public

My Commission Expires:

NOTARY PUBLIC STATE OF MISSISSIPPI AT LARGE.
BY COMMISSION EXPIRES: Feb. 2, 1997.
BONDED THRU NOTARY PUBLIC UNDERWRITERS.